In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-849

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA,
Appellants,

vs.

ORRIN W. FOX, a corporation,
MULLER CHEVROLET, a corporation,
and GENERAL MOTORS CORPORATION,
Appellees.

On Appeal from the United States District Court, Central District of California

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the summary judgment of a three judge court of the United States District Court, Central District of California entered on September 15, 1977. The judgment appealed from per-

manently enjoined the New Motor Vehicle Dealer Board of the State of California and other officials of the State of California from performing their duties as prescribed by certain provisions of the California Automobile Franchise Act (California Vehicle Code §§3060-3069), on the ground that the provisions of the Act violate the Due Process Clause of the Fourteenth Amendment. Appellants, who were made defendants in intervention in the action by uncontested order of the district court, submit this statement to show that this Court has jurisdiction of their appeal and that substantial questions are presented by it.[1]

OPINION BELOW

Unofficial reports of the opinion of the court below have appeared at 834 Antitrust & Trade Regulation Report, page D-1 (October 13, 1977) and 46 United States Law Week 2188 (October 18, 1977).

JURISDICTION

This action was brought to enjoin the enforcement by California state officials of a California statute, the California Automobile Franchise Act (California Vehicle Code §§3060-3069), on the grounds that the statute is unconstitutional under the Due Process

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[1]Appellants are informed and believe that the New Motor Vehicle Board of the State of California and the Department of Motor Vehicles of the State of California are also filing Jurisdictional Statements in this litigation with this Court.

Clause of the Fourteenth Amendment and the Supremacy Clause. The action was filed on April 13, 1976, while §2281 of Title 28 of the United States Code was fully effective. Although §2281 was repealed by Public Law 94-381, subsection 7 of the repealing statute specifically stated that the repeal was not applicable to any action filed prior to August 12, 1976. Under the terms of §2281 this action was required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. §2284. The action was so heard and the three judge court rendered an injunction restraining California state officials from executing their duties under the Act on the ground of the Act's unconstitutionality under the Due Process Clause. The right of appeal to this Court from such an injunction in a civil action required to be heard by a three judge district court is established by 28 U.S.C. §1253. Decisions which sustain the Court's jurisdiction in cases of this type include: *Hicks v. Miranda,* 422 U.S. 332, 342-343, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975) and *United States v. Georgia Public Service Commission,* 371 U.S. 285, 287-288, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963).

STATUTES INVOLVED AND DISTRICT COURT PROCEEDINGS

The provisions of the California Automobile Franchise Act which were held unconstitutional by the court below are California Vehicle Code §§3060-3063 and 3066-3069. Those sections, together with California Vehicle Code §507 which defines a relevant term,

are reproduced as Appendix C to this Statement. A copy of the opinion of the court below (labelled "Memorandum Decision") and the Summary Judgment it rendered thereon are reproduced as Appendices A and B, respectively, to this Statement. A copy of the Notice of Appeal filed by these appellants in the court below, showing the filing date of October 14, 1977, is reproduced as Appendix D to this Statement.

QUESTIONS PRESENTED

1. Is the expectation of establishing or relocating a retail automobile franchise a liberty or property which is protected by the procedural guarantees of the Due Process Clause of the Fourteenth Amendment?

2. Assuming that the procedural guarantees of the Due Process Clause do protect the expectation of establishing or relocating a retail automobile franchise, do those procedural guarantees require the State of California to provide an evidentiary hearing to persons holding that expectation prior to issuing an order which may delay the establishment or relocation of the franchise for a period of up to ninety days pending the outcome of an evidentiary hearing on the issue of whether there is good cause for permanently prohibiting the establishment or relocation of the franchise?

STATEMENT OF THE CASE

The New Motor Vehicle Board of the State of California (hereafter "Board") was created by California statute in 1967 and given responsibility for the licensing of new automobile retail dealers in that state. The Board was also given, by statute, the power to review decisions of the Department of Motor Vehicles of the State of California (hereafter "Department") imposing discipline upon licensed dealers, and the power to investigate public complaints concerning any licensed dealer and to undertake to arbitrate any dealer-customer dispute or to recommend disciplinary action to the Department regarding the dealer involved.

In 1973, the duties and responsibilities of the Board were substantially broadened by the passage of the California Automobile Franchise Act (hereafter "Act"). The Board was now given the additional power to review disciplinary decisions of the Department regarding the California license of any automobile manufacturer, distributor, or manufacturer's representative, and to receive and arbitrate or recommend Department action on any public complaints concerning any automobile manufacturer, distributor or manufacturer's representative. (California Vehicle Code §3050)

The 1973 Act also established certain adjudicatory functions for the Board to perform as part of a rather detailed legislative scheme for regulating aspects of the relationship between automobile manufacturers and their California retail dealers. The Act

prohibits any automobile manufacturer (hereafter sometimes "franchisor") from terminating any franchise which it has with a California automobile dealer (hereafter "franchisee") without first giving advance notice to the franchisee and the Board, and the Act requires franchisors to provide reasonable compensation to any dealer-franchisee as reimbursement for automobile delivery and preparation expenses and manufacturer furnished warranty servicing expenses incurred by a franchisee in connection with selling and servicing the franchisor's automobiles. (California Vehicle Code §§3060, 3064 and 3065) If the affected franchisee protests the termination of its franchise to the Board there can be no termination unless the Board finds that good cause exists for the termination in an evidentiary hearing. (California Vehicle Code §§3060, 3061, 3066-3069) Similarly, upon protest by a franchisee, the Board is given the power and duty to determine whether a franchisor has paid reasonable compensation to reimburse the protesting franchisee for delivery and preparation expense or for expense of warranty servicing. (California Vehicle Code §§3064-3069)

An additional, but related, feature of the 1973 Act triggered the litigation at bar. Vehicle Code §3062 provides that an automobile manufacturer may not establish a new franchisee or relocate an old franchisee without first giving written notice of such intention to the Board and to each of its existing franchisees for the same "line-make" of automobile located with the "relevant market area". Such area

is defined in Vehicle Code §507 as " . . . any area within a radius of 10 miles from the site of . . . [the] . . . potential new dealership." If any of the existing franchisees within the market area protest to the Board within 15 days of receiving such notice, the Board must issue an order temporarily prohibiting the franchisor from establishing or relocating the proposed dealership until the Board has held a hearing to determine if there is good cause for refusing to permit the proposed dealership to be established. If the Board, at such hearing, determines that good cause exists for not permitting the proposed dealership, the franchisor may not do so. The protesting franchisee has the burden of proving that good cause exists for not permitting the franchise to be established at the Board's hearing, which must be held within 60 days of the Board's order temporarily prohibiting the franchisor from establishing or relocating the proposed franchise. (California Vehicle Code §3066) Within 30 days after the hearing (or the receipt of a proposed decision from a hearing officer if such an officer is designated by the Board to hold the hearing), the Board must render its decision, or else the establishment of the proposed franchise is deemed approved. (California Vehicle Code §3068) It is unlawful for a franchisor to establish or relocate a franchise in violation of an order of the Board. (California Vehicle Code §11713.2(l))

Appellees herein filed suit on April 13, 1976 in the United States District Court, Central District of California, seeking a three judge court determination

that the Act was unconstitutional and that its enforcement should be enjoined. Appellee Orrin W. Fox Co. (hereafter "Fox") claimed to have executed a franchise agreement in May, 1975, with appellee General Motors Corporation (hereafter "GM") under which Fox was to be a newly established Buick dealer in Pasadena, California. Appellee Muller Chevrolet (hereafter "Muller") claimed to have made arrangements for a transfer of his existing Chevrolet franchise from Glendale to La Canada, California in December, 1975. The proposed establishment of both the Fox and Muller franchises were protested by the existing Buick and Chevrolet dealers, respectively, in the two relevant market areas in timely fashion under Vehicle Code §3062. The Board responded with orders prohibiting the establishment of the proposed franchises until it could hold a hearing under Vehicle Code §3066. For various reasons neither protest proceeded to a Board hearing prior to the filing of the within action by the three appellees.

In their complaint initiating this litigation, the appellees claimed that the Act violated their procedural due process rights under the Due Process Clause of the Fourteenth Amendment and was also invalid under the Supremacy Clause because it was in inherent conflict with the federal antitrust laws. The three judge district court addressed only the first of appellees' arguments in granting a Summary Judgment holding the entire California Automobile Franchise Act unconstitutional on its face because it deprived the appellees of their due process protected

rights to hearings prior to the deprivation of their liberty and property interests in establishing new, or relocated, automobile dealerships.[2]

The Summary Judgment granted by the district court also stated an alternative ground for holding the Act unconstitutional on its face even though this alternative ground was unmentioned in its Memorandum of Decision. The alternative ground so stated is that the Act fails to provide for a prompt hearing on the merits following the initial temporary deprival of appellees' liberty and property interest in establishing a new or relocated automobile dealership.

THE QUESTIONS ARE SUBSTANTIAL

THE APPELLEES CLEARLY ARE NOT ASSERTING INDIVIDUAL INTERESTS WHICH QUALIFY AS "LIBERTY OR PROPERTY" UNDER THE FOURTEENTH AMENDMENT, THUS THE PROCEDURAL GUARANTEES OF THAT AMENDMENT ARE NOT APPLICABLE.

Appellees Fox and Muller possess a desire to operate automobile dealerships, and appellee GM possesses a desire to franchise each of them to operate dealerships. Such business desires or future contractual expectations are clearly not within the limited

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[2]While the district court ruled that the entire California Automobile Franchise Act (Vehicle Code §§3060-3069) was unconstitutional, it would appear that only Vehicle Code §§3062 and 3063 and the references to §3062 contained in Vehicle Code §3066 were involved in the litigation before the district court. Thus the other provisions of the Act would appear to have been gratuitously voided even though they do not involve the Constitutional infirmities which the district court found in §§3062 and 3063 and the references to §3062 in §3066.

class of interests which this Court has stated are included with the phrase "liberty or property" in the Due Process Clause in the Fourteenth Amendment. The district court avoided any discussion of, or the making of any finding on, this point in its Memorandum of Decision (hereafter "Decision"). However, such a determination must be made under the "familiar two step analysis" which must be undertaken when the claim of a violation of the procedural due process rights of a citizen is made: first, a determination of whether the asserted interest of the citizen is encompassed within the Fourteenth Amendment's protection of "life, liberty or property" and, second, if protected interests are implicated, what procedures constitute "due process of law". (*Ingraham v. Wright,* ..... U.S. ....., 97 S.Ct. 1401, 1413, ... L.Ed.2d ..... (1977))

In a considerable number of decisions in recent years, all unmentioned in the district court's Decision, this Court has clearly established that a mere expectancy of continued employment or a future contractual benefit is not entitled to procedural due process protection because such an expectancy is neither a property interest or a liberty under the Amendment. Although appellees' asserted interest would appear to be more likely to be held to be "property" than a "liberty", the decisions of this Court clearly establish that they cannot be classified as the former. In *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971) and *Perry v. Sinderman,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1971) this Court

established that due process protected an interest in an intangible asset, such as a future contractual benefit or government benefit, as "property", only when a citizen's right to the benefit is established by a state's rules or by mutually explicit understandings with the state. (See 408 U.S. at 576-578 and 408 U.S. at 601-603.) Assuming there is no allegation of the state having bound itself contractually to provide the expected future benefit, the requisite establishment can be supplied only by the laws of the state involved. (*Bishop v. Wood,* 426 U.S. 341, 344-347, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)) There is no claim or allegation by appellees that their asserted interests in expected future contractual benefits is based upon any law of the State of California or any mutually explicit agreement with the State of California. Thus their expectations are not "property" for procedural due process purposes.

It is also clear that none of the expectations entertained by the appellees could qualify as a procedural due process protected "liberty". The cases mentioned above, as well as *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 1165, ... L.Ed.2d ..... (1976) make it plain that such liberties must be found either in the Bill of Rights, or have been recognized and protected by state law. No claim or assertion of such a source for the protection of appellees' expectations is made, and none can be.

In that the Decision contains any analysis of the question of whether the appellees' expectations con-

stitute either property or liberty under the Due Process Clause, it seems to implicitly adopt the position that the grievous losses which allegedly may be suffered by the appellees without an adjudication prior to a Board order delaying the establishment of a franchise require that due process procedural guarantees be afforded appellees. However, this Court has often stated that it is the nature of the interest asserted which must implicate the Due Process Clause, and not the harmful consequences or "grievous loss" allegedly occasioned by the failure to apply due process procedural guarantees. *(Smith v. Organization of Foster Families for Equality and Reform,* ..... U.S. ....., 97 S.Ct. 2094, 2108, ... L.Ed.2d ..... (1977); *Meachum v. Fano,* 427 U.S. 215, 224, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Board of Regents v. Roth, supra,* 408 U.S. at 570-571, 92 S.Ct. at 2705)

The substantiality of the questions presented by the district court's erroneous Decision can hardly be overemphasized. The Decision, unless reversed, will stand as a precedent for a complete departure from the analysis which this Court has so clearly mandated for the resolution of procedural due process issues. The Decision creates a new class of procedural due process protected interests—expected future contractual benefits. This new class of protected interests would expand the scope of application of the Fourteenth Amendment to an almost unimaginable degree. Lastly, the Decision involves a type of statute and a method of regulation which is quite common among

the states.[3] Unless reversed immediately it will have an unsettling effect on legislation regulating automobile manufacturer-dealer relations in many jurisdictions.

THE PROCEDURE IN THE CALIFORNIA AUTOMOBILE FRANCHISE ACT SATISFIES THE REQUIREMENTS ESTABLISHED IN MATHEWS v. ELDRIDGE, EVEN IF THE INTERESTS ASSERTED BY THE APPELLEES WERE DESERVING OF PROCEDURAL DUE PROCESS PROTECTION.

The Decision does not mention the analysis established as mandatory by this Court in *Mathews v. Eldridge,* 424 U.S. 319, 332-335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1975), and restated and applied in *Dixon v. Love,* ..... U.S. ....., 97 S.Ct. 1723, ... L.Ed.2d ..... (1977). Assuming that the expectations of the appellees were "property" or "liberty" interests entitled to procedural due process protection, an application of the three-part Eldridge analysis would demonstrate that the Act meets the procedural requirements of the Due Process Clause. First, the private interest affected by the Boards' temporary order is not vital and a temporary deprivation causes no grievous loss. Second, the existing procedure results in no

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[3]The case of *General GMC Trucks, Inc. v. General Motors Corporation,* presently the subject of a petition for writ of certiorari to this Court from the Supreme Court of Georgia, involves a similar statute in that state. The petition for writ of certiorari in that litigation contains an Appendix "D" which lists the statutes of nineteen states (including California) which impose conditions upon the establishment of new or relocated franchises in the marketing areas of existing franchisees handling the same line-make of automobile.

risk of a permanent deprivation, since it is merely a postponement until a full evidentiary hearing and decision, which must be rendered within 90 days of the temporary order. Additional procedural safeguards would be meaningless because the only option would be to have a full hearing, requiring the time consuming assemblage of evidence relevant to the factors listed in Vehicle Code §3063. Any preliminary hearing would be a hurried and error prone affair and presents no viable option to the existing procedure. Third, any type of preliminary hearing, given the complexity of the factors listed in Vehicle Code §3063, would be fiscally and administratively burdensome to the Board.

Respectfully submitted,

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December 8, 1977

(Appendices Follow)

Appendices

Appendix A

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

MEMORANDUM OF DECISION

[Filed Sept. 14, 1977]

Before ELY, Circuit Judge, and
GRAY and TAKASUGI, District Judges

WILLIAM P. GRAY, District Judge.

Plaintiffs General Motors Corporation and two retail automobile dealers in Southern California seek of this three-judge court a declaratory summary judgment that the California Automobile Franchise Act is unconstitutional on its face and as administered, and they seek a consequent injunction. This court has jurisdiction under 28 U.S.C. §§ 1331(a), 1337, 1343(3), and 2201. For reasons stated in this opinion, the requested relief will be granted.

The California governmental body now designated as the New Motor Vehicle Board (the Board) was created within the Department of Motor Vehicles by statute in 1967 and given responsibility for the licensing of new car dealers (California Vehicle Code §§ 3000 *et seq.*). In 1973, the California Automobile Franchise Act (the Act) added §§ 3060 to 3069 to the Vehicle Code, thereby giving the additional powers and functions to the Board that are challenged in this action.

Section 3062 provides that before an automobile manufacturer (franchisor) may establish an additional motor vehicle dealership (franchisee) or relocate an existing dealership, the franchisor must first give written notice of such intention to the Board and to each dealer for the same "line-make" of automobile within the "relevant market area." Such area is defined as ". . . any area within a radius of

10 miles from the site of a potential new dealership." (Vehicle Code § 507).

Any dealer receiving such notice may, within fifteen days thereafter, file with the Board a protest to the establishing or relocating of the dealership. When such a protest is filed, the Board is obliged automatically to issue an order to the franchisor that the proposed establishment or relocation of the franchisee may not take place pending a hearing on the merits of the protest and a final decision by the Board.

It is a misdemeanor for a franchisor to establish or relocate a franchisee in violation of an order of the Board (Vehicle Code §§ 11713.2(l) and 40000.11), and such violation is grounds for suspension or revocation of the license of a manufacturer or dealer to do business in California (Vehicle Code § 11705(a)(10)).

Section 3066(a) provides that, "Upon receiving a notice of protest," the Board shall issue an order fixing a time for the hearing, which shall be commenced within sixty days following such order. As the foregoing describes, the receipt by the Board of a protest automatically triggers both the order staying the proposed action by the franchisor and the order setting the hearing. The statute does not specify clearly that the same communication shall contain both orders or, if not, when one shall be issued in relation to the other. Although in the present instance concerning plaintiff Orrin W. Fox Co., the Board waited six weeks after issuing the injunction (on May 29) before it sent out the order setting the hearing (on July 8),

we are inclined to interpret the Act as requiring the injunction and the order to be promulgated concurrently.

The hearing may be conducted by the Board or by a hearing officer designated by the Board. Testimony of witnesses and documentary evidence may be presented by the parties, as well as by "other interested individuals and groups." (Vehicle Code § 3066(a)).

If the matter is heard by the Board and the Board fails to act within thirty days after such hearing, the proposed action is deemed to be approved (§ 3067). If the matter is heard by a hearing officer, he is required to prepare and submit in writing a proposed decision to the Board (Government Code § 11517(b)), and there is no time limit within which this must be accomplished. The Board may affirm or reverse the decision of the hearing officer, and, once again, if the Board does not act within thirty days, the proposed establishment or relocation of the franchisee is deemed approved (Vehicle Code § 3067). However, the Board may also decide to take additional evidence or refer the matter back to the hearing officer for further proceedings (Government Code § 11517(c)), in which event there is no time limit imposed other than the requirement that the decision be made ". . . within such . . . period as may be necessitated . . ." by the additional proceedings (Vehicle Code § 3067).

Thus, by the simple means of filing a protest, an automobile dealer can prevent a new competitor from being established, or an existing competitor from being relocated in new facilities, within ten miles of

the protesting dealer for at least ninety days plus as long as it may take for a hearing officer to submit ment of such additional proceedings as the Board may in writing a proposed decision and for the accomplish- direct. Plans to establish a dealership in a particular location necessarily involve commitments for the purchase or lease of real property, construction or alteration of premises, and for the acquiring of personnel, equipment and stock in trade. Bearing these things in mind, an actual or potential delay of three months, and perhaps much more, brought about by the filing of a protest could seriously hamper or even completely destroy the consummation of such plans.

Little imagination is needed in order to visualize how appealing such a prospect might be to a competing automobile dealer, particularly, inasmuch as his protest need not be accompanied by any showing whatever of probably *(sic)* success, irreparable injury if his protest is not granted, or a bond or any other undertaking.

The manner in which the passage of the Act and the administration thereof have affected the present plaintiffs is revealed in the uncontradicted affidavits and documentary exhibits submitted by the parties. The only Buick dealer in Pasadena terminated his franchise early in 1974, and a replacement dealer had not been established until May 1975, when plaintiffs General Motors and Orrin W. Fox Co. executed a franchise agreement. Protests promptly were filed by Buick dealers located in the nearby cities of Monrovia and San Gabriel on about May 22, 1975. On

May 29, 1975, the Board sent letters to General Motors advising of the protests and stating that "you may not . . . establish the proposed dealership until the Board has held a hearing as provided for in Section 3066 Vehicle Code, nor thereafter if the Board has determined that there is good cause for not permitting such additional dealership." The letter also advised that the Board would later fix a time for the hearing and would advise accordingly. On July 8, 1975, the Board assigned the dates of August 11 and 12, 1975, for the hearing.

However, as the result of requests for continuance by the protesters and by stipulation, and protracted litigation in the courts concerning the right to take pre-hearing depositions, the protests were reset for hearing on September 15, 1976. They therefore were still pending when the present action was filed, on April 13, 1976.

The foregoing recital shows that, under the provisions of the Act, the protesters were able to prevent plaintiff Fox from being established as a potential (although geographically rather remote) competitor for more than fifteen months (including the entire 1976 Buick model year), without any official consideration being given to the merit or lack of merit of the protests. Fox understandably assesses at many thousands of dollars its damages occasioned by such delay.

Plaintiff Muller Chevrolet took over an existing dealership in the Montrose section of Glendale in 1973. It soon became apparent to Muller that its physi-

cal facilities were completely inadequate and rapidly deteriorating and that a move to a new and much larger location was mandatory. In December 1974, Mr. Muller learned that the location of the current Volkswagen dealership in the adjacent community of La Canada might become available. Negotiations were begun that were contingent upon the Volkswagen dealer finding a new site for his operation, and upon the ability of the parties to finance their respective moves. After a year of complex and time consuming negotiations, an agreement was reached in December 1975 and the required notice of intention to relocate was served upon the Board and the surrounding Chevrolet dealers on about January 16, 1976. A few days later, Chevrolet dealers in Pasadena and Tujunga, respectively, filed with the Board letters saying, in effect, no more than "I protest," and on February 6, 1976, the Board responded by enjoining the proposed relocation pending a hearing on the protests. About two weeks later, on February 23, 1976, the Board "tentatively" set the hearing for June 23 through 25, 1976, and on April 21, 1976, issued a formal order confirming those dates. It is worthy of note here that such hearing was scheduled for a time more than four months after the injunction had been issued.

It appears from a supplemental affidavit filed by Mr. Muller on September 17, 1976, that the scheduled hearing took place before a hearing officer and that the latter rendered a decision favorable to the proposed relocation on about August 20, 1976. Then

began the thirty-day waiting period within which time the Board might act upon that decision before the proposed relocation could be deemed approved and the injunction finally lifted (Vehicle Code § 3067). On September 14, 1976, before the end of such waiting period, Muller was advised that the new leasehold premises were no longer available for his dealership because of his long failure to take possession and otherwise assume the obligations of the lease. Muller thereupon "gave up" with respect to this litigation and is starting all over again in his attempt to find a new site for his business.

We find that the hereinabove described procedures mandated by the California statute are in gross violation of the Due Process Clause of the Fourteenth Amendment. As the Supreme Court has said, the right to the liberty proclaimed by that provision of the Constitution ". . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). Certainly, the right to grant or undertake a Chevrolet dealership and the right to move one's business facilities from one location to another are included within this protection. Of course, the right to do these things is not unlimited. Legitimate conflicting interests of other individuals and of the public as a whole often require that restrictions be imposed. The Fourteenth

Amendment requires only that such restrictions be administered in accordance with the procedural safeguards that have been established over the years as constituting due process of law.

One of the basic requirements of due process is that the "liberty" of a person may be curtailed only after a hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *see, Mullane v. Central Hanover Bank,* 339 U.S. 306, 313 (1950).

> "[I]t is now well settled that a temporary nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.
>
> * * *
>
> The Fourteenth Amendment draws no bright lines around 3-day, 10-day, or 50-day deprivations of property. . . . While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind."
>
> *Fuentes v. Shevin,* 407 U.S. 67, 84-86 (1972).

Here, the plaintiffs were deprived of their rights for many months without any hearing whatever.

It is true, as the defendants point out, that there are extraordinary situations in which some valid governmental interest is at stake that justifies immediate interference with the rights of a person before a noticed hearing can be accomplished. For example, the Supreme Court has upheld statutes permitting governmental agencies summarily to seize operational

control of banking institutions in serious financial difficulty. *Fahey v. Mallonee,* 332 U.S. 245 (1947). *See also, Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950), in which a procedure for summary seizure of misbranded drugs by the Food and Drug Administration was upheld. But such procedures are justified only when a responsible public official concludes that to delay action pending a hearing would likely result in serious harm to the public. Here, there is no provision in the Act for any public official to exercise his discretion as to whether the public interest requires that immediate action be taken in advance of a hearing; instead, the injunction automatically follows a simple protest by a competitor.

There are, of course, instances in which concepts of due process will also permit private parties to obtain judicial orders that restrain their adversaries from taking actions pending a hearing to determine whether the challenged actions should be enjoined as being in violation of the legitimate interests of the complainants. But the party seeking such a restraining order must make a persuasive showing that to delay injunctive relief until after a hearing would result in irreparable injury to him, and that he would be likely to prevail in such hearing. Even with such a showing, a pre-hearing restraining order is normally limited to ten days. *See,* for example, Rule 65(b) of the Federal Rules of Civil Procedure. There is also the normal requirement of a bond to insure the enjoined party against loss occasioned by an improvidently issued restraining order. None of these requirements of due process are provided for in the Act.

The defendants urge that the Act is not constitutionally defective in its operation because the plaintiffs could have filed and circulated their notices of intention early in their negotiations, and long before consummating their transactions, thus shortening or perhaps avoiding the delay between readiness to operate and the hearing. In the case of Muller, it appears that the negotiations for the lease of the new premises were protracted and involved many problems that were uncertain of satisfactory solution. It would hardly have been practicable for Muller to publish an intention to relocate, thus inspiring almost inevitable protest, and go through an expensive hearing without knowing that the desired premises were available. It is also not hard to imagine the dampening effect upon the negotiations that would be imposed by the awareness of the long delay in completion of the transaction that any irresponsible protest could inherently cause.

Apart from these practical considerations, the short answer to the defendants' contention is that the plaintiffs had a constitutional right to do what they wanted to do, subject only to the restrictions of due process herein discussed.

In light of the foregoing, it is evident to us that the Act is unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment. Having upheld the plaintiffs' challenge on this ground, it is unnecessary for us to consider their alternative claim that the Act is invalid under the Supremacy Clause of the Constitution because it is in inherent conflict with the federal antitrust laws.

However, before rendering a judgment for the plaintiffs, we must resolve an additional problem that has been troubling us from the inception of this action, namely, whether or not principles of comity require, or even permit, that we abstain from adjudicating this matter. We are fully mindful of the teaching of Justice Black, in *Younger v. Harris,* 401 U.S. 37, 44 (1971), that the notion of comity denotes ". . . a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." We are in complete accord with this concept, and we are aware that the courts of California are just as dedicated to preserving the principles of the United States Constitution as are we. Our decision in this matter has been withheld for several months in the hope that one of the cases pending against the Board in state courts would result in an adjudication that would deal with the constitutional problem here presented. However, this has not occurred,* and we are obliged to act, particularly in light of the rule laid

*On May 23, 1977, the California Court of Appeal (Third District) affirmed a trial court ruling that the Act was unconstitutional because four of the nine members of the Board are required to be new car dealers, and thus presumably antagonistic to franchisors. *American Motors Sales Corp. v. New Motor Vehicle Board,* 69 C.A.3d 983 (1977). The Legislature and the Governor promptly responded by enacting (on June 24, 1977) and approving (on July 7, 1977), an amendment to the Act which provides that only the non-new car dealer members of the Board may decide matters involving protests. The amendment made no other change in the procedures established by the Act.

down in *Wisconsin v. Constantineau,* 400 U.S. 433, 439 (1971):

> ". . . abstention should not be ordered merely to await an attempt to vindicate the claim in a state court. Where there is no ambiguity in the state statute, the federal courts should not abstain but should proceed to decide the federal constitutional claim. . . . We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal courts should stay its hand and not decide the question before the state courts decided it."

As is discussed above, we find the Act to be clearly unconstitutional, and there is no ambiguity that could be resolved in such manner as to harmonize it with the requirements of due process. Accordingly, a judgment declaring such unconstitutionality and enjoining enforcement of the provisions of the Act pertaining to protest procedure is being filed contemporaneously herewith. This opinion shall constitute findings of fact and conclusions of law, as authorized by Rule 52(a) of the Federal Rules of Civil Procedure.

Dated: September 14, 1977.

William P. Gray
United States District Judge

Appendix B

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

[Filed Sept. 14, 1977]

SUMMARY JUDGMENT

The motion of plaintiffs Orrin W. Fox Co., Muller Chevrolet and General Motors Corporation has been submitted for decision by this three-judge court after having been briefed and orally argued. In accordance with the Memorandum of Decision being filed contem-

poraneously herewith, and the court having found that there is no just reason for delay in the entry of judgment,

It Is Ordered, Adjudged And Decreed that:

1. The California Automobile Franchise Act (California Vehicle Code §§ 3060-69) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by depriving motor vehicle manufacturers and their prospective and existing dealers of liberty and property without prior notice and the opportunity to be heard.

2. The California Automobile Franchise Act violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide for a prompt hearing on the merits following the initial peremptory deprivation of liberty and property.

3. Defendants, their agents, and any persons acting on their behalf, at their direction or under their control are hereby enjoined from taking any action to implement or enforce the Act's provisions.

4. Plaintiffs shall recover their costs herein in the amount of $.....

Dated: September 14, 1977.

Walter Ely
United States Circuit Judge

William P. Gray
United States District Judge

Robert M. Takasugi
United States District Judge

Appendix C

CALIFORNIA VEHICLE CODE SECTIONS

* * *

§ 507. *Relevant Market Area*

The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

* * *

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentations by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a

hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating,

or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

§ 3062. *Establishing or Relocating Dealerships*

In the event that a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership or relocating an existing motor vehicle dealership within or into a relevant market area where the same line-make is then represented, the franchisor shall in writing first notify

the board and each franchisee in such line-make in the relevant market area of his intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 15 days of receiving such notice or within 15 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting such dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

For the purposes of this section, the reopening in a relevant market area of a dealership that has not been in operation for one year or more shall be deemed the establishment of an additional motor vehicle dealership.

§ 3063. *Good Cause*

In determining whether good cause has been established for not entering into or relocating an additional franchise for the same line-make, the board should take into consideration the existing circumstances, including, but not limited to:

(1) Permanency of the investment.

(2) Effect on the retail motor vehicle business and the consuming public in the relevant market area.

(3) Whether it is injurious to the public welfare for an additional franchise to be established.

(4) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.

(5) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

* * *

§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notifications by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good

cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

§ 3067. *Decision*

The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. If the board fails to act within 30 days after such hearing, within 30 days after the board receives a proposed decision where the case is heard before a hearing officer alone, or within such period as may be necessitated by Section 11517 of the Government Code or as may be mutually agreed upon by the parties, then the proposed action shall be deemed to be approved. Copies of the decision shall be delivered to the parties personally or sent to them by registered mail, as well as to all individuals and groups, which have requested notification by the board of protests and decisions by the board. The decision shall be final upon its delivery or mailing and no reconsideration or rehearing shall be permitted.

§ 3068. *Judicial Review*

Either party may seek judicial review of final decisions of the board. Time for filing for such review shall not be more than 45 days from the date on which the final order of the board is made pub-

lic and is delivered to the parties personally or is sent them by registered mail.

§ 3069. *Application of Article*

The provisions of this article shall be applicable to all franchises existing between dealers and manufacturers, manufacturer branches, distributors and distributor branches at the time of its enactment and to all such future franchises.

* * *

Appendix D

United States District Court
Central District of California

No. CV 76-1200-WPG

Orrin W. Fox Co., a corporation, Muller Chevrolet, a corporation, and General Motors Corporation,

Plaintiffs,

vs.

New Motor Vehicle Board of the State of California; Melicio H. Jacaban, Audrey B. Jones, John D. Barnes, John Onesian, Winfield J. Tuttle and John B. Vandenberg, as members of the New Motor Vehicle Board; Sam W. Jennings, as Executive Secretary of the New Motor Vehicle Board; Department of Motor Vehicles of the State of California; and Herman Sillas, as Director of the Department of Motor Vehicles,

Defendants, and

Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California,

Intervening Defendants.

[Filed Oct. 14, 1977]

NOTICE OF APPEAL

To the Clerk of the above-entitled Court:

Please take notice that the intervening defendants Northern California Motor Car Dealers Association

and Motor Car Dealers Association of Southern California hereby appeal to the Supreme Court of the United States from that certain partial summary judgment entered on September 15, 1977, as amended, and from all parts of said partial summary judgment.

Dated: October 13, 1977.

Crow, Lytle & Gilwee
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